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*Proposed Attorneys for Debtors and  
Debtors in Possession*

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

In re:	)	Case No. 20-50682 (MEH)
	)	
WAVE COMPUTING, INC., <i>et al.</i> ,	)	Chapter 11 (Joint Administration Requested)
	)	
Debtors. <sup>1</sup>	)	Assigned to the Hon. M. Elaine Hammond
	)	
	)	<b>MOTION OF DEBTORS PURSUANT TO</b>
	)	<b>11 U.S.C. §§ 105(a), 363(b), AND 503 FOR</b>
	)	<b>ENTRY OF ORDERS (I) AUTHORIZING</b>
	)	<b>THE PAYMENT OF CRITICAL</b>
	)	<b>VENDORS; AND (II) GRANTING</b>
	)	<b>RELATED RELIEF</b>
	)	
	)	<u>Hearing Scheduled:</u>
	)	Date: May 1, 2020
	)	Time: 11:15 a.m. (Pacific Time)
	)	

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are: Wave Computing, Inc. (4264), MIPS Tech, Inc. (8247), Hellosoft, Inc. (8640), Wave Computing (UK) Limited (None), Imagination Technologies, Inc. (6967), Caustic Graphics, Inc. (7272), and MIPS Tech, LLC (2161). The Debtors' mailing address is 3201 Scott Blvd, Santa Clara, CA 95054.

1 ) Place: 280 South 1st St.  
2 ) San Jose, CA 95113-3099  
3 )

4 Wave Computing, Inc. ("Wave") and its debtor affiliates, as debtors and debtors in possession  
5 (collectively, the "Debtors") in the above-captioned chapter 11 cases (the "Chapter 11 Cases"), submit  
6 this motion (this "Motion"), pursuant to sections 105, 363, and 503 of title 11 of the United States  
7 Code (the "Bankruptcy Code") and Rules 6003 and 6004 of the Federal Rules of Bankruptcy  
8 Procedure (the "Bankruptcy Rules"), for entry of an order (i) authorizing, but not directing, the Debtors  
9 to pay prepetition amounts owing in the ordinary course on account of certain Critical Vendors and  
10 503(b)(9) Claimants (each as defined below and collectively, the "Claimants"), in an aggregate interim  
11 amount not to exceed \$80,000 (the "Interim Order Cap") and in an aggregate final amount not to  
12 exceed \$160,000, inclusive of the amounts paid pursuant to this Interim Order (the "Final Order Cap");  
13 (ii) authorizing, but not directing, the Debtors to honor outstanding obligations to the Claimants on a  
14 postpetition basis in the ordinary course of business and consistent with past practice; and (iii)  
15 authorizing, but not directing, the Debtors to pay in advance if reasonably desirable to procure goods  
16 and services in the ordinary course of business and otherwise consistent with past practice; and (iv)  
17 granting related relief.

18 A proposed form of order granting the relief requested herein on an interim basis (the "Interim  
19 Order") is attached hereto as **Exhibit A**.

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. JURISDICTION

The United States Bankruptcy Court for the Northern District of California (this “Court”) has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334, the *Order Referring Bankruptcy Cases and Proceedings to Bankruptcy Judges*, General Order 24 (N.D. Cal.), and Rule 5011-1(a) of the Bankruptcy Local Rules for the Northern District of California (the “Bankruptcy Local Rules”). This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

### II. BACKGROUND

On the date hereof (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under the Bankruptcy Code in this Court. The Debtors continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No party has requested the appointment of a trustee or examiner in these Chapter 11 Cases, and no statutory committee has been appointed.

Additional information regarding the Debtors’ business, capital structure, and the circumstances preceding the Petition Date may be found in *Declaration of Lawrence R. Perkins in Support of the Debtors’ Chapter 11 Petitions and First Day Pleadings* (the “First Day Declaration”), filed contemporaneously herewith and incorporated herein by reference.<sup>2</sup>

### III. RELIEF REQUESTED

By this Motion, the Debtors respectfully request entry of the Interim Order, substantially in the form of Exhibit A, and the granting of, among other things, the following relief:

- i. authorizing, but not directing, the Debtors to pay:
  - a. prepetition amounts owing in the ordinary course on account of certain Critical Vendors (as defined below), provided such vendor has executed an agreement substantially in the form attached as Exhibit 1 to the Interim Order (the “Vendor Agreement”); and

---

<sup>2</sup> All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the First Day Declaration.

b. prepetition amounts owing in the ordinary course on account of certain 503(b)(9) Claimants (as defined below);

ii. authorizing, but not directing, the Debtors to honor outstanding obligations to the Claimants on a postpetition basis in the ordinary course of business and consistent with past practice;

iii. authorizing, but not directing, the Debtors to pay in advance if reasonably desirable to procure goods and services in the ordinary course of business and otherwise consistent with past practice; and

iv. granting related relief.

#### IV. DESCRIPTION OF DEBTORS' VENDORS

##### A. The Critical Vendors

The Debtors operate a privately-traded, independent technology company engaged in the licensing of coarse grain reconfigurable architecture. As part of these operations, the Debtors rely on certain information technology, software, and colocation services (collectively, the "Critical Vendors"). Without these services, the Debtors would likely experience significant disruption in licensing their products to customers, which would cause revenue streams to dry up and cause a negative impact on the Debtors' likelihood of success in these Chapter 11 Cases.

The Debtors do not have long-term supply agreements with most of their Critical Vendors, and instead, source the service on an order-by-order basis. As a result, the Debtors have limited leverage to compel performance from the Critical Vendors on commercially reasonable terms.

With the assistance of their advisors, the Debtors have identified five (5) service providers that may be "critical" to the Debtors' business.<sup>3</sup> In identifying the Critical Vendors, the Debtors considered a variety of factors including:

- the services provided;
- the general terms of vendor performance over the past twelve (12) months;
- the Debtors' business needs for the services provided;

---

<sup>3</sup> Such Critical Vendors disclosed on **Exhibit B** attached hereto. Exhibit B has been filed under seal pending the Court's ruling on the Debtors' Motion to Seal, filed contemporaneously herewith.

- whether the services are provided pursuant to a long-term contract or on an order-by-order basis;
- whether failure to pay all or part of a particular vendor's claim would cause the vendor to refuse to provide services on a postpetition basis;
- whether failure to pay a particular vendor could result in contraction of trade terms as a matter of applicable non-bankruptcy law or regulation;
- whether the vendor is a sole- or limited-source service provider due to particular local, regional, or national customer preferences;
- whether alternative vendors are available that could provide similar services on equal (or better) terms and, if so, whether the Debtors would be able to continue operating while transitioning business thereto;
- the degree to which replacement costs (including pricing, transition expenses, etc.) would exceed the amount of a vendor's prepetition claim; and
- whether the Debtors' inability to pay all or part of the vendor's prepetition claim could trigger financial distress for the applicable vendor.

Through the prescreening process, the Debtors determined that the Critical Vendors identified are vendors that (i) do not have long-term contractual relationships with the Debtors; (ii) provide services critical to the Debtors' ongoing business operations; and (iii) are either sole-source providers or cannot be replaced without significant time and expense, which would cause irreparable harm to the Debtors' operations. The Debtors do not intend to afford any contract counterparties critical vendor status unless absolute necessary for the preservation of the Debtors' business and otherwise consistent with their sound business judgment.

The Debtors will use commercially reasonable efforts to require Critical Vendors to continue to provide services in line with historical terms. In connection with these efforts, the Debtors seek authority to require, in their sole discretion and as a condition of payment of any Critical Vendor claim, the Critical Vendor to enter into a Vendor Agreement, substantially in the form attached as **Exhibit 1** to the Interim Order. The Vendor Agreement will require the Critical Vendor to continue to supply services to the Debtors on customary trade terms until the earlier of (i) the effective date of a chapter



1 11 plan for the Debtors or (ii) two (2) years from the date of such agreement. As defined in the Vendor  
2 Agreement, “customary trade terms” means trade terms at least as favorable to the Debtors as those  
3 terms governing the relationship between the Critical Vendor and Debtors within the twelve (12)  
4 months prior to the Petition Date, or such other trade terms that are acceptable to the Debtors in their  
5 sole discretion, including payment of cash in advance. The Vendor Agreement, once accepted by a  
6 Critical Vendor, shall be the legally binding contractual relationship between the parties governing the  
7 commercial relationship as provided therein.  
8

9 As of the Petition Date, the Debtors estimate that they owed \$80,000 or less to Critical Vendors  
10 on account of prepetition debt.

11 **B. The 503(b)(9) Claimants**

12 In the ordinary course of business, the Debtors may have received certain inventory, goods, or  
13 materials from various domestic vendors (collectively, the “503(b)(9) Claimants”) within the 20-day  
14 period immediately preceding the Petition Date. Each of these 503(b)(9) Claimants provide their  
15 respective inventory, goods, or materials on an order-by-order basis. The Debtors believe that, as of  
16 the Petition Date, they do not owe any amounts on account of goods or materials delivered by the  
17 503(b)(9) Claimants. Out of an abundance of caution, however, the Debtors are requesting the  
18 authority, but not the direction, to pay any *de minimis* undisputed claims of 503(b)(9) Claimants as  
19 may emerge, with total aggregate payments not to exceed \$5,000. The Debtors intend to pay the  
20 503(b)(9) Claimants only where they believe, in the exercise of their sound business judgment, that  
21 the benefits to their estates from making such payments will exceed the costs to their estates.  
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1 **V. BASIS FOR RELIEF REQUESTED**

2 **A. The Court Should Grant the Relief Requested Pursuant to Sections 105(a) and**  
3 **363(b) of the Bankruptcy Code**

4 Courts have recognized that it is appropriate to authorize the payment of prepetition obligations  
5 where necessary to protect and preserve the estate.<sup>4</sup> In so doing, these courts have acknowledged that  
6 the theories behind sections 105(a) and 363(b) of the Bankruptcy Code support the payment of  
7 prepetition claims as requested herein.<sup>5</sup>

8 Pursuant to section 363(b) of the Bankruptcy Code, payment of prepetition obligations may be  
9 authorized where a sound business purpose exists for doing so.<sup>6</sup> In fact, courts have recognized that  
10 in certain instances a debtor's fiduciary duty can "only be fulfilled by the preplan satisfaction of a  
11 prepetition claim."<sup>7</sup> As such, courts in this and other districts routinely grant debtors authority to pay  
12 certain prepetition claims in similar circumstances.<sup>8</sup>

14  
15 <sup>4</sup> See, e.g., *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017) (noting that courts have  
16 approved payment of prepetition invoices of essential suppliers); *In re Just for Feet, Inc.*, 242 B.R.  
17 821, 826 (D. Del. 1999) (finding that payment of prepetition claims to certain trade vendors was  
18 "essential to the survival of the debtor during the chapter 11 reorganization"); *In re Ionosphere Clubs,*  
19 *Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) ("The ability of a bankruptcy court to authorize the  
20 payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor  
21 is not a novel concept."); see also *Burchinal v. C. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d  
22 1484, 1490 (9th Cir. 1987) (acknowledging in the context of an appeal of a debtor in possession  
23 financing motion that cases permit the unequal treatment of prepetition debt in contexts such as  
24 payment of debts to providers of unique and irreplaceable supplies when necessary for rehabilitation).

25 <sup>5</sup> See *Jevic*, 137 S. Ct. at 985 (offering considerations for when payment should be made to critical  
26 vendors)

27 <sup>6</sup> See *Ionosphere Clubs*, 98 B.R. at 175 (touting the "broad flexibility" of section 363(b)); *Armstrong*  
28 *World Indus., Inc. v. James A. Phillips, Inc.*, (*In re James A. Phillips, Inc.*), 29 B.R. 391, 398 (S.D.N.Y.  
1983) (citing section 363 as basis for allowing contractor to pay prepetition claims of potential lien  
claimants).

<sup>7</sup> *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002).

<sup>8</sup> See *In re PG&E Corp.*, Case Nos. 19-30088, 19-30089 (Bankr. N.D. Cal. Jan. 31, 2019) (authorizing  
payment of prepetition claims of shippers, warehouseman, and other lien claimants) [Docket No. 214];  
*In re Verity Health Sys. of Cal., Inc.*, Case No. 18-20151 (Bankr. N.D. Cal. Sept. 7, 2018) (authorizing  
payment of prepetition claims of certain critical vendors) [Docket No. 134]; *In re Am. Suzuki Motor*  
*Corp.*, Case No. 12-22808 (Bankr. C.D. Cal. Nov. 7, 2012 (authorizing payment of prepetition claims  
of critical vendors in the ordinary course) [Docket No. 69]; see also *In re Forever 21, Inc.*, Case No.

1 Courts may also authorize payment of prepetition vendor claims in appropriate circumstances  
2 based on section 105(a) of the Bankruptcy Code. Section 105(a) codifies the Court's inherent  
3 equitable powers to "issue any order, process, or judgment that is necessary or appropriate to carry out  
4 the provisions of this title."<sup>9</sup> Permitting a debtor to honor certain prepetition obligations under section  
5 105(a) is consistent with the recognized policy of the Bankruptcy Code—preserving going concern  
6 value and maximizing property available to satisfy creditors.<sup>10</sup> Thus, section 105(a) permits courts to  
7 authorize the payment of prepetition obligations prior to plan confirmation when such payment is  
8 essential to the continued operation of the debtor's business.<sup>11</sup>

10 Here, there is a significant likelihood that one or more of the Critical Vendors identified will  
11 refuse to continue providing services to the Debtors absent payment of their prepetition debt. Without  
12 these services, the Debtors will likely experience significant difficulty in maintaining their license  
13 agreements with various customers, potentially leading to a significant decline in royalty revenue.

15 In an effort to avoid maintain the greatest flexibility possible, the Debtors have filed their list  
16 of five (5) service providers that may be "critical" to their business under seal as **Exhibit B**. The  
17 Debtors do not intend to award any party Critical Vendor status unless absolutely necessary to  
18 maintain services, and thus do not wish to tip their hand in postpetition negotiations. The Debtors do  
19 believe, however, that a termination of services from each of the Critical Vendors identified would  
20 cause immediate and irreparable harm to the Debtors' business, their customer base, and their estates.  
21 As a result, the Debtors request the authority, but not the direction to pay their Critical Vendors the  
22

25 \_\_\_\_\_  
26 19-12122 (Bankr. D. Del. Sept. 30, 2019) (authorizing payment of prepetition claims of both critical  
and foreign vendors under sections 105(a) and 363(b) of the Bankruptcy Code) [Docket No. 103].

27 <sup>9</sup> 11 U.S.C. § 105(a).

<sup>10</sup> See *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'Ship*, 526 U.S. 434, 453 (1999).

28 <sup>11</sup> See *Just for Feet*, 242 B.R. at 825.

1 modest amounts requested under the Interim Order Cap and the Final Order Cap, with the aggregate  
2 total to be paid to all Claimants on account of prepetition debt not to exceed \$160,000.

3 **B. The Court Should Authorize the Payment of Claims Entitled to Priority Pursuant**  
4 **to Section 503(b)(9) of the Bankruptcy Code**

5 Section 503(b)(9) of the Bankruptcy Code provides administrative priority for the “value of  
6 any goods received by the debtor within 20 days before the date of commencement of a case under  
7 this title in which goods have been sold to the debtor in the ordinary course of such debtor’s  
8 business.”<sup>12</sup> These claims must be paid in full for the Debtors to confirm a chapter 11 plan.<sup>13</sup> The  
9 exact timing of such payments is left to the court’s discretion.<sup>14</sup> Accordingly, payment of such claims  
10 at the outset of the case rests with the discretion of the court and affords claimants with no more than  
11 what they would already be entitled to receive under a chapter 11 plan.

13 In the ordinary course, the Debtors may purchase certain inventory, goods, or materials from  
14 various domestic vendors. Although the Debtors do not believe any such inventory goods, or materials  
15 were recently purchased, there is a chance certain items may been purchased within the twenty days  
16 immediately preceding the filing of these Chapter 11 Cases. Therefore, out of an abundance of  
17 caution, the Debtors are requesting the authority, but not the direction, to pay the undisputed claims  
18 of such 503(b)(9) Claimants in an aggregate amount not to exceed \$5,000.

20 **C. The Processing of Checks and Electronic Fund Transfers Should Be Authorized**

21 The Debtors have sufficient funds to pay the Claimants in the ordinary course of business using  
22 cash proceeds from the Debtors’ proposed debtor in possession financing and the cash generated  
23 through operations. Under the Debtors’ existing cash management system, the Debtors have the  
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25  
26 <sup>12</sup> 11 U.S.C. § 503(b)(9).

27 <sup>13</sup> See 11 U.S.C. § 1129(a)(9).

28 <sup>14</sup> See *In re Global Home Prods., LLC*, Case No. 06-10340, 2006 WL 3791955, at \*3 (Bankr. D. Del. Dec. 21, 2006) (agreeing with parties that the timing of the payment of administrative expense claims is left to the discretion of the court).

1 ability to readily identify checks or wire transfer requests relating to the prepetition Claimants, as  
2 applicable, and believe there is minimal risk that inadvertent payment of unauthorized checks or wire  
3 transfer requests will be made. Thus, the Debtors respectfully request that the Court authorize, but not  
4 direct, applicable banks and financial institutions to receive, process, honor, and pay, to the extent of  
5 funds on deposit, any and all checks issued or to be issued and electronic fund transfers requested or  
6 to be requested by the Debtors relating to the prepetition Claimants as set forth herein. The Debtors  
7 also seek authority, but not direction, to issue new postpetition checks or effect new postpetition  
8 electronic fund transfers in replacement of any checks or transfer requests on account of the prepetition  
9 Claimants that is dishonored or rejected as a result of these Chapter 11 Cases.

#### 11 **VI. EMERGENCY CONSIDERATION**

12 The Debtors respectfully request emergency consideration of this Motion pursuant to  
13 Bankruptcy Rule 6003, which empowers a court to grant relief within the first 21 days after the  
14 commencement of a chapter 11 case “to the extent that relief is necessary to avoid immediate and  
15 irreparable harm.” To preserve the value of its business and comply with applicable law, the Debtors  
16 may need to pay certain prepetition claims of their Claimants on an expedited basis. Failure to make  
17 these payments may result in a termination of software or technology services, which has the potential  
18 to immediately and irreparably disrupt licensing arrangements and customer relations to the detriment  
19 of the Debtors’ estates, creditors, and other parties in interest. Accordingly, the Debtors respectfully  
20 submit that it has satisfied the “immediate and irreparable harm” standard of Bankruptcy Rule 6003  
21 and, therefore, respectfully request that the Court approve the relief requested in this Motion on an  
22 emergency basis.

#### 25 **VII. REQUEST FOR BANKRUPTCY RULE 6004 WAIVERS**

26 The Debtors respectfully request a waiver of any applicable notice requirements under  
27 Bankruptcy Rule 6004(a) and any stay of the order granting the relief requested herein pursuant to  
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1 Bankruptcy Rule 6004(h). As explained above and in the First Day Declaration, the relief requested  
2 herein is necessary to avoid immediate and irreparable harm to the Debtors. Accordingly, ample cause  
3 exists to justify the waiver of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day  
4 stay imposed by Bankruptcy Rule 6004(h), to the extent such notice requirements and such stay apply.  
5

## 6 **VIII. RESERVATION OF RIGHTS**

7 Nothing contained herein is intended or shall be construed as (i) an admission as to the validity  
8 of any claim against the Debtors; (ii) a waiver of the Debtors' or any party in interest's rights to dispute  
9 the amount of, basis for, or validity of any claim of any creditor or interest holder under applicable  
10 nonbankruptcy law; (iii) a waiver of any claims or causes of action which may exist against any  
11 creditor or interest holder; or (iv) an assumption, adoption, or rejection of any agreement, contract, or  
12 lease between the Debtors and any third party under section 365 of the Bankruptcy Code. The Debtors  
13 reserve all of their rights under the Bankruptcy Code.

## 14 **IX. NOTICE**

15 Notice of this Motion has been provided by email, facsimile, or overnight courier to: (i) the  
16 Office of the U.S. Trustee Region 17 (Attn: Marta E. Villacorte); (ii) the holders of the 30 largest  
17 unsecured claims against the Debtors (on a consolidated basis); (iii) counsel for the DIP Agent and  
18 DIP Lender; (iv) the Debtors' Critical Vendors and 503(b)(9) Claimants; and (v) those persons who  
19 have formally appeared in these Chapter 11 Cases and requested service pursuant to Bankruptcy Rule  
20 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice  
21 is required.

22 No prior request for the relief sought in this Motion has been made by the Debtors to this or  
23 any other court.  
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**WHEREFORE**, the Debtors respectfully request entry of the Interim Order, substantially in the form attached hereto as **Exhibit A** granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: April 28, 2020

SIDLEY AUSTIN LLP

/s/ Samuel A. Newman

Samuel A. Newman

### *Proposed Attorneys for Debtors and Debtors in Possession*

**EXHIBIT A**  
**INTERIM ORDER**

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Debtors. <sup>1</sup>	)	Assigned to the Hon. M. Elaine Hammond
	)	
	)	<b>INTERIM ORDER GRANTING MOTION</b>
	)	<b>OF DEBTORS PURSUANT TO 11 U.S.C.</b>
	)	<b>§§ 105(a), 363(b), AND 503 FOR ENTRY</b>
	)	<b>OF ORDERS (I) AUTHORIZING THE</b>
	)	<b>PAYMENT OF CRITICAL VENDORS;</b>
	)	<b>AND (II) GRANTING RELATED RELIEF</b>
	)	
	)	<u>Hearing Scheduled:</u>
	)	Date: May 1, 2020
	)	Time: 11:15 a.m. (Pacific Time)
	)	

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are: Wave Computing, Inc. (4264), MIPS Tech, Inc. (8247), Hellosoft, Inc. (8640), Wave Computing (UK) Limited (None), Imagination Technologies, Inc. (6967), Caustic Graphics, Inc. (7272), and MIPS Tech, LLC (2161). The Debtors' mailing address is 3201 Scott Blvd, Santa Clara, CA 95054.

1 ) Place: 280 South 1st St.  
2 ) San Jose, CA 95113-3099  
3 )

4 Upon the motion (the "Motion"),<sup>2</sup> dated April 27, 2020 of Wave Computing, Inc. ("Wave") and  
5 its debtor affiliates, as debtors and debtors-in-possession (collectively, the "Debtors") in the above-  
6 captioned chapter 11 cases (the "Chapter 11 Cases"), pursuant to sections 105, 363, and 503 of title  
7 11 of the United States Code (the "Bankruptcy Code") and Rules 6003 and 6004 of the Federal Rules  
8 of Bankruptcy Procedure (the "Bankruptcy Rules"), for entry of an order (i) authorizing, but not  
9 directing, the Debtors to pay prepetition amounts owing in the ordinary course on account of certain  
10 Critical Vendors and 503(b)(9) Claimants (each as defined below and collectively, the "Claimants"),  
11 in an aggregate interim amount not to exceed \$80,000 (the "Interim Order Cap") and in an aggregate  
12 final amount not to exceed \$160,000, inclusive of the amounts paid pursuant to this Interim Order  
13 (the "Final Order Cap"); (ii) authorizing, but not directing, the Debtors to honor outstanding  
14 obligations to the Claimants on a postpetition basis in the ordinary course of business and consistent  
15 with past practice; and (iii) authorizing, but not directing, the Debtors to pay in advance if reasonably  
16 desirable to procure goods and services in the ordinary course of business and otherwise consistent  
17 with past practice; and (iv) granting related relief, all as more fully set forth in the Motion; and upon  
18 consideration of the First Day Declaration; and this Court having jurisdiction over this matter pursuant  
19 to 28 U.S.C. §§ 157 and 1334, the *Order Referring Bankruptcy Cases and Proceedings to Bankruptcy*  
20 *Judges*, General Order 24 (N.D. Cal.), and Local Rule 5011-1(a) of the Bankruptcy Local Rules for the  
21 Northern District of California; and this matter being a core proceeding within the meaning of 28 U.S.C.  
22 § 157(b)(2); and the Court being able to issue a final order consistent with Article III of the United  
23 States Constitution; and venue of this proceeding and the Motion being proper before this Court  
24 pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found and determined that notice of  
25 the Motion as provided to the Notice Parties is reasonable and sufficient under the circumstances, and  
26 no other or further notice need be provided; and the relief requested in the Motion being in the best

27 \_\_\_\_\_  
28 <sup>2</sup> Each capitalized term used but not otherwise defined herein shall have the meaning ascribed to it in the Motion.

1 interests of the Debtors' estates, their creditors and other parties in interest and necessary to prevent  
2 immediate and irreparable harm; and the Court having determined that the legal and factual bases set  
3 forth in the Motion establish just cause for the relief granted herein; and after due deliberation and  
4 sufficient cause appearing therefor,

5 **IT IS HEREBY ORDERED THAT:**

6 1. The Motion is granted as provided herein.

7 2. The Debtors are authorized, but not directed, to pay on an interim basis up to \$80,000  
8 on account of the prepetition claims of one or more of the Critical Vendors identified on Exhibit B to  
9 the Motion.

10 3. Notwithstanding anything to the contrary contained herein, the Debtors are not  
11 authorized to pay any Critical Vendor claim for claimants bound by an executory contract, except for  
12 those 503(b)(9) Claimants, if any, which the Debtors shall be authorized to pay in an aggregate amount  
13 not to exceed \$5,000 pursuant to this Interim Order and subject to the Interim Order Cap.

14 4. The Debtors are authorized, but not directed, to use their commercially reasonable  
15 efforts to obtain from any Critical Vendor, as a prerequisite to obtaining payment pursuant to this  
16 Interim Order, written acknowledgement of its obligation to continue providing services to the Debtors  
17 on customary trade terms, substantially in the form attached to this Interim Order as **Exhibit 1**  
18 (the "Vendor Agreement"), which shall require, among other things, that the customary trade terms be  
19 no less favorable than the most favorable trade terms provided by the Critical Vendor to the Debtors  
20 in the three months prior to the Petition Date; provided, however, that such payment shall not prejudice  
21 the Debtors' right to challenge, as a violation of the automatic stay or otherwise, a Critical Vendor's  
22 refusal to provide postpetition goods or services on customary trade terms; provided further that the  
23 Debtors' failure to request such an acknowledgement shall not be deemed a waiver of the Debtors'  
24 rights hereunder.

25 5. The Vendor Agreement attached hereto as **Exhibit 1** is approved on an interim basis;  
26 provided, however, that the Debtors are authorized to modify the Vendor Agreement if a particular  
27 situation so requires.  
28

1           6.       If any Critical Vendor accepts payment according to the terms of this Interim Order  
2 and does not continue supplying goods or services to the Debtors in accordance with the customary  
3 trade terms, then: (i) the Debtors may seek to cause such Critical Vendor to repay payments made to  
4 it on account of its prepetition claim to the extent that such payments exceed the postpetition amounts  
5 then owing to such Critical Vendor; (ii) upon recovery by the Debtors, any prepetition claim of such  
6 party shall be reinstated as if the payment had not been made; and (iii) if there exists an outstanding  
7 postpetition balance due from the Debtors to such party, the Debtors may seek to recharacterize and  
8 apply any payment made pursuant to the relief requested by the Motion to such outstanding  
9 postpetition balance and the Debtors may take appropriate steps to cause such supplier to repay to the  
10 Debtors such paid amounts that exceed the postpetition obligations then outstanding without the right  
11 of any setoffs, claims, provisions for payment of any claims, or otherwise.

12           7.       In addition, the Debtors are authorized, but not directed, to pay in advance if reasonably  
13 desirable to procure goods and services in the ordinary course of business and otherwise consistent  
14 with past practice.

15           8.       Nothing herein shall impair or prejudice the Debtors' ability to contest, in their sole  
16 discretion, the extent, perfection, priority, validity, or amounts due on account of the Claimant's  
17 prepetition claims. The Debtors do not concede that any claims satisfied pursuant to this Interim Order  
18 are valid, and the Debtors expressly reserve all rights to contest the extent, validity, or perfection or to  
19 seek the avoidance of all such liens or the priority of such claims.

20           9.       Each of the banks and/or financial institutions at which the Debtors maintain their  
21 accounts relating to payment of the prepetition obligations approved herein is authorized, when  
22 requested by the Debtors in the Debtors' discretion, to receive, process, honor, and pay all checks  
23 presented for payment and all fund transfer requests made by the Debtors related thereto to the extent  
24 that sufficient funds are on deposit in such accounts. Such banks and financial institutions are  
25 authorized to rely on the representations of the Debtors as to which checks or fund transfer requests  
26 are issued or authorized to be paid pursuant to this Interim Order without any further inquiry and  
27 without liability for following the Debtors' instructions.

1           10.     The Debtors are authorized to issue postpetition checks, or to effect postpetition fund  
2 transfer requests, in replacement of any checks or fund transfer requests that are dishonored as a  
3 consequence of these Chapter 11 Cases with respect to prepetition amounts owed in connection with  
4 the Claimant's prepetition claims.

5           11.     Nothing in this Interim Order: (i) is intended or shall be deemed to constitute an  
6 assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to  
7 the validity of any claim against the Debtors or their estates; (ii) shall impair, prejudice, waive, or  
8 otherwise affect the rights of the Debtors or their estates to contest the validity, priority, or amount of  
9 any claim against the Debtors or their estates; (iii) shall impair, prejudice, waive, or otherwise affect  
10 the rights of the Debtors or their estates with respect to any and all claims or causes of action against  
11 any third party; or (iv) shall be construed as a promise to pay a claim or continue any applicable  
12 program postpetition, which decision shall be in the discretion of the Debtors. Any payment made  
13 pursuant to this Interim Order is not intended to be nor should it be construed as an admission as to  
14 the validity of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

15           12.     Notwithstanding anything to the contrary contained in this Interim Order, any payment  
16 made or other action taken by the Debtors pursuant to the authority granted herein, as well as the  
17 exercise of any and all other rights and authorizations granted or approved hereunder, shall be subject  
18 in all respects to any interim and/or final orders regarding the Debtors' use of cash collateral and/or  
19 postpetition debtor in possession financing facilities, approved by this Court in these Chapter 11 Cases  
20 (the "DIP Orders").

21           13.     In the event of any inconsistency between the terms or conditions of this Interim Order  
22 and the terms or conditions of the DIP Orders, the provisions of the DIP Orders shall govern and  
23 control.

24           14.     Notice of the Motion as provided therein shall be deemed good and sufficient notice of  
25 such Motion under the circumstances and such notice satisfies the notice requirements of Bankruptcy  
26 Rule 2002 and the Bankruptcy Local Rules.

27           15.     Notwithstanding any potential applicability of Bankruptcy Rule 6004(h), this Order is  
28 immediately effective and enforceable upon its entry.

1           16.     The Debtors are authorized and empowered to take all actions necessary or appropriate  
2 to implement the relief granted in this Order

3           17.     A final hearing to consider the relief requested in the Motion shall be held on  
4 [\_\_\_\_\_] at [\_\_\_\_\_] (Prevailing Pacific Time) and any objections or responses to  
5 the Motion shall be filed and served so as to be actually received on or prior to [\_\_\_\_\_] at  
6 [\_\_\_\_\_] (Prevailing Pacific Time).

7           18.     This Court shall retain jurisdiction to hear and determine all matters arising from or  
8 related to the implementation, interpretation, or enforcement of this Interim Order

9                               \*\* END OF ORDER \*\*

**EXHIBIT 1**  
**VENDOR AGREEMENT**

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1 **VENDOR AGREEMENT**

2 Wave Computing, Inc. and each of its debtor affiliates (collectively, the “Company”), on the  
3 one hand, and the supplier identified in the signature block below (“Supplier”), on the other hand,  
4 hereby enter into the following vendor agreement (this “Vendor Agreement”) dated as of the date in  
the Supplier’s signature block below.

5 **Recitals**

6 WHEREAS, on April 27, 2020 (the “Petition Date”), Wave Computing, Inc. and each of its  
7 debtor affiliates filed voluntary petitions for relief under chapter 11 of the United States Bankruptcy  
8 Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”), in the United States Bankruptcy Court for  
the Northern District of California (the “Court”).

9 WHEREAS, on [●], the Court entered the *Interim Order Granting Motion of Debtors Pursuant*  
10 *to 11 U.S.C. §§ 105(a), 363(b), and 503 for Entry of Orders (I) Authorizing the Payment of Critical*  
11 *and Foreign Vendors; and (II) Granting Related Relief* (the “Interim Order”) [Docket No. [●]], which  
12 authorize the Debtors, on an interim basis and under certain conditions, to pay the prepetition claims  
of certain Critical Vendors and/or Foreign Vendors, subject to the terms and conditions set forth  
therein.

13 [WHEREAS, on [●], the Court entered the *Final Order Granting Motion of Debtors Pursuant*  
14 *to 11 U.S.C. §§ 105(a), 363(b), and 503 for Entry of Orders (I) Authorizing the Payment of Critical*  
15 *and Foreign Vendors; and (II) Granting Related Relief* (the “Final Order,” and together with the  
16 Interim Order, the “Vendor Orders”)¹ [Docket No. [●]], which authorize the Debtors, on an final basis  
and under certain conditions, to pay the prepetition claims of certain Critical Vendors and/or Foreign  
Vendors, subject to the terms and conditions set forth therein.]²

17 WHEREAS, prior to the Petition Date, Supplier provided services to the Company, and the  
Company paid Supplier for such services, according to Customary Trade Terms (as defined herein).

18 WHEREAS, the Company and Supplier (each a “Party,” and collectively, the “Parties”) agree  
19 to the following terms as a condition of payment on account of certain prepetition claims Supplier may  
20 hold against the Company.

21 **Agreement**

22 1. Recitals. The foregoing recitals are incorporated herein by reference as if set forth at  
length herein.

23 2. Supplier Payment. Supplier represents and agrees that, after due investigation, the sum  
24 of all amounts currently due and owing by the Company to Supplier is \$[●] (the “Agreed Supplier  
25 Claim”). Following execution of this Vendor Agreement, the Company shall, in full and final  
satisfaction of the Agreed Supplier Claim, pay Supplier \$[●] on account of its prepetition claim

26  
27 <sup>1</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the  
Vendor Orders.

28 <sup>2</sup> [NTD: To be included in Vendor Agreements entered into after entry of the Final Order.]



1 (the “Supplier Payment”) (without interest, penalties, or other charges), as such invoices become due  
2 and payable.

3 3. Agreement to Supply.

4 a. Supplier shall supply goods to and/or perform services for the Company, and  
5 the Company shall accept and pay for goods and/or services from Supplier, for the duration of the  
6 Company’s chapter 11 cases based on the following: trade terms at least as favorable to the Company  
7 as those practices and programs (including credit limits, pricing, cash discounts, timing of payments,  
8 allowances, product mix, availability, and other programs) in place in the 180 days prior to the Petition  
9 Date except for any partial payments or other payments (or assurances) the Company made with  
10 respect to any unfinished product (collectively, the “Customary Trade Terms”).

11 b. The Customary Trade Terms may not be modified, adjusted, or reduced in a  
12 manner adverse to the Company, except as agreed to in writing by the Parties.

13 4. Other Matters.

14 a. Supplier will not separately seek payment from the Company on account of any  
15 prepetition claim (including, without limitation, any reclamation claim or any claim pursuant to section  
16 503(b)(9) of the Bankruptcy Code) outside the terms of this Vendor Agreement or a plan of  
17 reorganization confirmed in the Company’s chapter 11 case.

18 b. Supplier will not file or otherwise assert against the Company, its assets, or any  
19 other person or entity or any of their respective assets or property (real or personal) any lien, regardless  
20 of the statute or other legal authority upon which the lien is asserted, related in any way to any  
21 remaining prepetition amounts allegedly owed to Supplier by the Company arising from prepetition  
22 agreements or transactions. Furthermore, if Supplier has taken steps to file or assert such a lien prior  
23 to entering into this Vendor Agreement, Supplier will promptly take all necessary actions to remove  
24 such liens.

25 5. Supplier Breach.

26 a. In the event that the Company pays Supplier its Supplier Payment and Supplier  
27 is determined to have breached this Vendor Agreement (a “Supplier Breach”), upon written notice to  
28 Supplier, Supplier shall promptly pay to the Company immediately available funds in an amount equal  
to, at the election of the Company, the Supplier Payment or any portion of the Supplier Payment which  
cannot be recovered by the Company from the postpetition receivables then owing to Supplier from  
the Company.

b. In the event that the Company recovers the Supplier Payment pursuant to  
Section 5(a) hereof or otherwise, the full Agreed Supplier Claim shall be reinstated as if the Supplier  
Payment had not been made and treated in accordance with the plan of reorganization confirmed in  
the Debtors’ chapter 11 cases.

c. Supplier agrees and acknowledges that irreparable damage would occur in the  
event of a Supplier Breach and remedies at law would not be adequate to compensate the Company.  
Accordingly, Supplier agrees that the Company shall have the right, in addition to any other rights and  
remedies existing in its favor, to seek an injunction or injunctions to prevent breaches of the provisions

1 of this Vendor Agreement and to enforce its rights and obligations hereunder not only by an action or  
2 actions for damages but also by an action or actions for specific performance, injunctive relief and/or  
3 other equitable relief. The right to equitable relief, including specific performance or injunctive relief,  
4 shall exist notwithstanding, and shall not be limited by, any other provision of this Vendor Agreement.  
5 Supplier hereby waives any defense that a remedy at law is adequate and any requirement to post bond  
6 or other security in connection with actions instituted for injunctive relief, specific performance, or  
7 other equitable remedies.

8 6. Notice.

9 If to Supplier, notice shall be provided to the person and address identified in the signature  
10 block hereto.

11 If to Company, notice shall be provided to:

12 Wave Computing, Inc.  
13 Attn: Sanjai Kohli  
14 3201 Scott Boulevard  
15 Santa Clara, CA 95054  
16 skohli@wavecomp.com

17 and

18 Sidley Austin LLP  
19 Attn: Samuel A. Newman  
20 555 West Fifth Street  
21 Los Angeles, CA 90013  
22 sam.newman@sidley.com

23 7. Representations and Acknowledgements. The Parties agree, acknowledge, and  
24 represent that:

25 a. the Parties have reviewed the terms and provisions of the Vendor Orders and  
26 this Vendor Agreement and consent to be bound by such terms;

27 b. this Vendor Agreement is expressly subject to the procedures approved in the  
28 Vendor Orders;

c. any payments made on account of the Agreed Supplier Claim shall be subject  
to the terms and conditions of this Vendor Agreement and the Vendor Orders;

d. if Supplier refuses to supply goods or services to the Company as provided  
herein or otherwise fails to perform any of its obligations hereunder, the Company may exercise all  
rights and remedies available under the Vendor Orders, the Bankruptcy Code, or applicable law; and

e. in the event of disagreement between the Parties regarding whether a breach  
has occurred, either Party may apply to the Court for a determination of their relative rights, in which  
event, no action may be taken by either Party, including but not limited to, the discontinuing of

1 shipment of goods or provision of services from Supplier to the Company, until a ruling of the Court  
2 is obtained.

3 8. Confidentiality. In addition to any other obligations and confidentiality between  
4 Supplier and Company, Supplier agrees to hold in confidence and not disclose to any party: (a) this  
5 Vendor Agreement; (b) any and all payments made by the Company pursuant to this Vendor  
6 Agreement; (c) the terms of payment set forth herein; and (d) the Customary Trade Terms  
7 (collectively, the “Confidential Information”); provided that if any party seeks to compel Supplier’s  
8 disclosure of any or all of the Confidential Information, through judicial action or otherwise, or  
9 Supplier intends to disclose any or all of the Confidential Information, Supplier shall immediately  
10 provide the Company with prompt written notice so that the Company may seek an injunction,  
11 protective order, or any other available remedy to prevent such disclosure; provided, further, that, if  
12 such remedy is not obtained, Supplier shall furnish only such information as Supplier is legally  
13 required to provide.

14 9. Miscellaneous.

15 a. The Parties hereby represent and warrant that: (i) they have full authority to  
16 execute this Vendor Agreement on behalf of the respective Parties; (ii) the respective Parties have full  
17 knowledge of, and have consented to, this Vendor Agreement; and (iii) they are fully authorized to  
18 bind that Party to all of the terms and conditions of this Vendor Agreement.

19 b. This Vendor Agreement sets forth the entire understanding of the Parties  
20 regarding the subject matter hereof and supersedes all prior oral or written agreements between them.  
21 This Vendor Agreement may not be changed, modified, amended, or supplemented, except in a writing  
22 signed by both Parties.

23 c. Signatures by facsimile or electronic signatures shall count as original  
24 signatures for all purposes.

25 d. This Vendor Agreement may be executed in counterparts, each of which shall  
26 be deemed to be an original, but all of which shall constitute one and the same agreement.

27 e. The Parties hereby submit to the exclusive jurisdiction of the Court to resolve  
28 any dispute with respect to or arising from this Vendor Agreement.

f. This Vendor Agreement shall be deemed to have been drafted jointly by the  
Parties, and any uncertainty or omission shall not be construed as an attribution of drafting by any  
Party.

[Signature Page Follows]

1 AGREED AND ACCEPTED AS OF THE DATE SET FORTH BELOW:  
2

3  
4 **[COMPANY]**

**[SUPPLIER]**

5  
6  
7 \_\_\_\_\_  
8 By:  
9 Title:  
10 Date:

\_\_\_\_\_

By:  
Title:  
Address:  
Date:

**EXHIBIT B**  
**CRITICAL VENDORS**

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**POTENTIAL CRITICAL VENDORS**

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